Groundwater: Allocation, Development and Pollution (Summer Conference, June 6-9) 1983

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Problems of Interstate Allocation of Groundwater

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PROBLEMS OF INTERSTATE ALLOCATION

OF

GROUNDWATER

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GROUNDWATER: Allocation, Development, and Pollution

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Short Course

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Each States Rt to body common to 2 or more states is limited by it's equitable apportion.

Hinderlander v. Cherry Ck (1938)

Equit App. - Wyoming v. Colo. (1922) – what is states equit apportionment?

1963 373 U.S. 373 - Lake Mead

Washington v. Oregon 1936

groundwater + equitable apport.

- no other cases address eq. app + groundwater

I. Essential Facts About Groundwater and Groundwater Law.

A. About groundwater resources -- aquifers and their contents.

1. Groundwater directly supplies only about one-fifth of the water used in the United States, but it is far more important than that percentage would suggest.

a. Most of the water in watercourses has reached them from percolating groundwater. Pumping from an aquifer or diverting from a river are usually alternative means of using the same water supply.

b. Water in streams fluctuates seasonally and cyclically, and often unpredictably. Water stored in an aquifer (naturally or artificially) is available at the touch of the button that starts the pump. For this reason underground storage is particularly useful at times when the surface supply is unavailable. Conjunctive operation of surface and

underground supplies makes for efficiency in achieving maximum satisfaction of water demand.

c. Groundwater storage is more efficient than storage in surface reservoirs because water does not evaporate from subsurface aquifers; groundwater storage does not inundate and destroy valuable land; aquifers serve to treat stored water, filtering both pathogens and contaminants; they also serve to transmit water without ditches, pipes, or canals.

2. Most water supplies available for use in the United States -- surface, underground, or both -- are accessible to pumping or diversion in more than one state.

B. About groundwater law.

1. The multiplicity of labelled doctrines of groundwater law in various states share a common purpose: to allocate among potentially competing users a scarce resource which is adequate for only some of the demands: "absolute

ownership" or the rule of unlimited capture by the overlying owner; "reasonable use"; "correlative rights"; "prior appropriation." All begin no earlier than the English decision in Acton v. Blundell, 12 Mees. & W. 324, 152 Eng. Rep. 1223 (1843). That case was based on the since discarded factual premise that the ways of groundwater are unknown and unknowable.

2. "Priority of appropriation" has been the preferred doctrine to or toward which arid states in the west have moved since New Mexico and Oregon, in 1927, adopted legislative systems for its administration. (See Yeo v. Tweedy, 34 N.M. 611, 286 Pac. 970 (1929). For a careful account of the early development, see Kirkwood, Appropriation of Percolating Water, 1 Stan. L. Rev. 1 (1948).)

   a. When "priority of appropriation" is transferred from water running in a stream to water stored and "percolating" through an aquifer, a number of new problems arise:

(1) Is the water available for appropriation limited to 'safe yield'? (2) Is 'mining' beyond safe yield to be permitted, and if so, what are the limits? (3) What increases in pump lifts are permissible, and how are costs of increases to be determined and shared? (4) By what means are necessary adjustments to be made when previous definitions or calculations of 'safe yield' require revision? (5) What governments are empowered or required to prevent physical damages to groundwater resources, by excavating, mining, blasting, garbage disposal, fertilizers, and disposition of toxic chemical wastes? How are costs of conservation to be allocated to (a) beneficiaries; (b) taxpayers of state or nation?

b. Contrast priority of appropriation of groundwater and water from a surface stream. Administration of a priority system served by a creek or river requires only

determining the quantity of each diverter's right and ministerial action of turning off the diversions in inverse chronological order of initiation as water grows shorter. Pollution is preventable by prohibitions, but if the stream's contents are flushed at least once per season, permanent damage is most unlikely. Even fish kills can be replaced in nearly every instance.

c. The ultimate problem in allocating groundwater is shared by uses of other stored water from large surface reservoirs like Lake Mead on the Colorado River. In any year in which water can be held over, junior users argue that any present shortage not only can but should be met from storage, rather than holding water in storage to evaporate, and the unevaporated residue to be used by senior users if the pre-drought rains do not return. Most historic errors from miscalculating future water supply

have been in the direction of disastrous over-optimism.

d. Surface water precedents dealing with surface reservoirs are not usually helpful because:

(1) Most surface waters are constructed to serve a single project. If not, ad hoc contracts or legislation usually settle priority issues in advance.

(2) The hydrologic uncertainties about quantities of water in storage are of a different order of magnitude for surface and underground storage. Water in a surface reservoir can be calculated by resort to gauged depth of water and an area capacity curve. The water contents of an aquifer are determinable from a variety of physical data, but data are usually insufficient until that aquifer is in deep trouble.

II. Interstate Water Law.

A. Facts about states.

1. Boundaries of the 50 United States are constitutionally fixed and substantially immovable. (U.S. Const. art. IV, § 3, cl. 1.)

2. A state's jurisdiction to make and enforce law is limited by its territorial limits.

B. Each state's power to create, regulate, transfer, and terminate water rights is limited to its equitable share of the interstate water resource to which two or more states have access. (Hinderlider v. La Plata & Cherry Creek Ditch Co., 304 U.S. 92 (1938).)

C. The methods of establishing a state's equitable share are, in order of first historic recognition:

1. A suit for equitable apportionment in the original jurisdiction of the Supreme Court.

2. An interstate compact with the consent of Congress under U.S. Const., art. 1, § 10.

3. A "congressional apportionment" by or

under authority of an Act of Congress. (Arizona v. California, 373 U.S. 546 (1963); 376 U.S. 340 (1964) (decree).)

D. All such methods of establishing a State's equitable share may, within reasonable limits at least, operate retroactively to alter or divest what within one state would be a vested property right not subject to being taken without the "just compensation" required by the final clause of the fourteenth amendment.

III. Sporhase v. Nebraska ex rel. Douglas, 102 Sup. Ct. 3456 (1982).

A. Sporhase was decided July 2, 1982, on the last crowded day of the Court's 1981-82 term. It was not an interstate case, but a Nebraska case presented by the owners of land in Nebraska appealing from a decision refusing them a permit to irrigate their adjoining land in Colorado from their Nebraska well. The United States Supreme Court held that the part of a Nebraska statute denying such a permit for water use in a state which denies reciprocity to Nebraska is unconstitutional. The Court

remanded to Nebraska to determine whether the unconstitutional provision is severable from the remainder of the statute. The Nebraska Supreme Court has since decided that it is indeed severable.

The important holding of Sporhase in doctrinal terms is clear: the dormant or negative commerce clause (i.e., the commerce clause of its own force where Congress has not exercised its "power to regulate commerce among the several states") does invalidate some state legislation with respect to groundwater and/or groundwater rights. That statement, however, is only the introduction to the critical issues which will require answers.

B. The Court's formulation of issues. The issues formulated by Justice Stevens for a 7-justice majority are:

> "(1) [W]hether ground water is an article of commerce and therefore subject to congressional legislation;
>
> "(2) [W]hether restriction on the interstate transportation of ground water imposes an impermissible burden on commerce;
>
> "(3) [W]hether Congress has granted the States permission to engage in ground water regulation that otherwise would be impossible." (Id. at 3458.)

1. The Court's answers, in three roman numbered sections of its opinion, follow in the same order: (1) yes; (2) yes; (3) no. The astonishing part of the opinion is that the Court found it necessary to address the first and third questions. Both "issues" are beyond range of reasonable argument. However, the care taken to elucidate the obvious has itself provoked consternation and fear. There is as a result a distinct danger that the judicial excursions may produce a flurry of misdirected legislation.

2. Non-issues:

   a. The Court's "issue (1)". Who could doubt that "water" is a commodity, if the question relates to extracted water from wells or springs, bottled or barrelled as a commodity, and offered for sale, with or without additives found in beverages whether soft, brewed, or distilled. It is clear, however, that Nebraska's statute did not relate to "water" as a commodity,

but to "water rights."

It is clear that Congress within reasonable limits can regulate water rights. Water rights affect commerce. Congress can regulate whatever interstate activities affect interstate commerce, including Roscoe Filburn's production of a few excess acres of wheat fed entirely to his own animals on his own farm. (Wickard v. Filburn, 317 U.S. 111 (1942).)

Whether the subject matter of regulation is a commodity has never been the touchstone of regulation since Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824). The federal statute providing for enrolling vessels in the coasting trade preempted state law granting a monopoly to navigation on interstate water although the ferryboats did not carry a "commodity." Congress has regulated interstate transportation of women for immoral purposes in the Mann Act, without denominating either women

or the purposes of transportation a "commodity." (Caminetti v. United States, 242 U.S. 470 (1917); Edwards v. California, 314 U.S. 160 (1941) (statute barring interstate migration of indigents unconstitutional.)

The Nebraska Supreme Court said that "water" is not a commodity, but it seems most improbable that the state court intended to challenge by an irrelevant dictum a power of Congress which Congress had not attempted to exercise. (State ex rel. Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614 (Neb. 1981).)

The "commodity" language was sometimes used by the Supreme Court in an earlier era to describe activities which states can regulate, although an aspect of commerce, until Congress provides to the contrary. (E.g., Clason v. Indiana, 306 U.S. 430 (1939) (dead horses not "articles of interstate commerce" for the

purpose of invalidating Indiana's Animal Disposal Act, although it is clear the Supreme Court did not intend to put dead horses gratuitously outside power of Congress if Congress should legislate on subject).)

b. The Court's "issue (3)". Has Congress granted "permission" to the States to regulate groundwater?

No "permission" statute was cited. It would be extraordinary if such a statute could be found. Reason: The Court's opinions from Willson v. Black-bird Creek Marsh Co., 27 U.S. (2 Pet.) 244 (1829), through Hudson County Water Company v. McCarter, 209 U.S. 349 (1908), have been clear that no such congressional permission is needed.

Indeed, Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), adopted the view that "permission" by Congress would be an unconstitutional delegation if it related to future state legis-

lation. That view was overturned in United States v. Sharpneck, 355 U.S. 286 (1958). It is now clear that Congress can relinquish to states regulation of interstate commerce. (Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946); Western S.L.I. Co. v. Board of Equalization, 451 U.S. 648 (1981).

IV. The Narrow Holding of Sporhase.

A. The narrow holding of Sporhase can be stated best in the terms used by the Court. The following text of Neb. Rev. Stat. § 46.613.01 is reproduced with the provision held unconstitutional stricken, numbers are inserted preceding each of the three conditions of the statute which remain. The three conditions survived "facial examination" (102 Sup. Ct. at 3465) and are not unconstitutional until and unless Nebraska hereafter makes an egregious mistake:

> "Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water

> Resources for a permit to do so. If the Director of Water Resources finds that
>
> > (1) the withdrawal of the ground water requested is reasonable,
> >
> > (2) is not contrary to the conservation and use of ground water,
> >
> > (3) and is not otherwise detrimental to the public welfare,
>
> he shall grant the permit ~~if-the-state in-which-the-water-is-to-be-used-grants reciprocal-rights-to-withdraw-and-transport-ground-water-from-that-state for-use-in-the-State-of-Nebraska.~~" [Parenthetical numbers and strike out added.]

B. The elimination of the stricken words of that statute does not necessarily impair its vitality to serve the purpose Nebraska originally pursued. Indeed, their elimination may improve its vitality by persuading the Director and reviewing courts to state the reasons for denial of a permit rather than to repeat the statutory words of a legislative ipse dixit. A final footnote to Justice Rehnquist's dissent (joined by Justice O'Connor) understates the case:

> ". . . I . . . see nothing in the Court's opinion that would preclude the Nebraska Department of Water Resources from denying appellants a permit because of remaining conditions in the statute." (102 Sup. Ct. at 3469 n.3.)

There is, I would say, nothing in the

Court's opinion to be seen.

C. Further limitations in the Court's opinion make clear that on a record with different facts even the unconstitutional language might be operative:

> "If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision." (102 Sup. Ct. at 3465.)

> [The set of facts which that sentence describes is not easy to visualize. However, it is clear that the clause stricken would not have been stricken if appropriate facts -- of which those just described are only an example -- were in the record.]

The Court went on to say:

> "A demonstrably arid state conceivably might be able to marshall evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water." (Id.)

V. The Facts Missing From The Sporhase Record.

A. The facts were supplied in an amicus brief signed by the Attorneys General of Colorado and of several western states:

> In 1977 Colorado denied the Sporhase farm owners a permit to drill a well in Colorado. Reason: no water was available to appropriate. The applicants did not appeal.

Of course, the Court could not properly take judicial notice of the fact from a brief, and it did not. However, the fact would be sufficient to establish beyond peradventure that the conditions in the surviving parts of the Nebraska statute could not be met by a permit to export.

B. The facts of life on the Nebraska-Colorado border: fragile detente.

Thompson v. Colorado Ground Water Commission, 575 P.2d 372 (Colo. Sup. Ct. 1978). The view from Colorado:

> The Colorado Ground Water Commission denied the application by one Gordon L. Thompson to construct a well and appropriate water from the Northern High Plains Designated Ground Water Basin in Yuma County, Colorado, less

than three miles from the Nebraska line. The Commission found that no water was available to appropriate.

If farther from the state line, the Commission would have determined the water available within a circle of a three-mile radius from the proposed well. Since 24 per cent of that circle fell in Nebraska, the Commission reduced the supply by 24 per cent. It also rejected the contention that extensive well-drilling and pumping in Colorado would reverse the slope of the water table into Nebraska, and intercept Nebraska water percolating from Colorado.

The Colorado Court wrote:

> "Expert testimony supported the commission's position that overappropriation of the aquifer at the state line, with the intent to stabilize or reverse the aquifer flow to the benefit of Colorado, would seriously injure vested rights far west of the state line and could ignite a destructive aquifer depletion race with Nebraska, an adjoining state. Evidence that a portion of Colorado's ground water naturally flows into adjoining states, when considered in the context of the commission's overall ground water policy, does not establish a breach of statutory duty by the commission in its determination. Id. at 377.

C. Would the missing facts -- which are not judicially noticeable -- have made a difference had they been in the record? Clearly yes, if the Court had fully grasped their significance. Although the naked words of Nebraska and Colorado statutes can be read like the patriotic snarls of competing nuclear powers, it is apparent that Nebraska and Colorado had achieved -- pre-Sporhase -- a kind of detente or mutual toleration based on a recognition of the costs of uncontrolled pumping on either side of the boundary.

1. Is the Colorado-Nebraska detente typical? Some evidence that it probably is, is that a number of western States appeared as amici curiae to ask for affirmance of the Nebraska Supreme Court's decision. Only the City of El Paso, supporting its commerce clause claim to Texas groundwater, asked for reversal.

2. If the Colorado-Nebraska situation is not typical, it should be. The lesson learned from a century and a half of experience since Acton v. Blundell in 1843 is clear. Users of a short supply

of an economic good taken from a common pool must, in mutual self-interest, combine to carry out and enforce against avaricious dissidents some basis for rationing the resource. Failure to do so is destructive of the resource, and to nearly everyone's self-interest accurately perceived. Verification is found in the fact that only in Texas does the rule of "absolute ownership" prevail with respect to percolating groundwater. Even in Texas it is modified to forbid a surface owner from pumping water when it cannot be beneficially used.

3. The foregoing is the most plausible explanation of Altus v. Carr, 255 F. Supp. 828, aff'd without opinion, 385 U.S. 35, the only prior Supreme Court case which serves as even a partial precedent for Sporhase. Indeed, Friendswood Development Co. v. Smith-Southwest Industries, Inc., 576 S.W.2d 21 (Tex. 1978), attributed the result in Altus v. Carr to Texas' attachment to the now aberrational "absolute ownership" doctrine of underlying groundwater.

D. An opinion which leaves unclear what the result will be on the narrow facts of Sporhase is not a good basis to predict what the Court may have intended to say about other cases -- or even about a case like Sporhase if all relevant facts had been in the record. However, a broad reading of Sporhase, federalizing the law of groundwater rights, is possible.

VI. The Broadest Reading of Sporhase: A Recipe for Total Disaster.

A. "The [Nebraska] reciprocity requirement does not survive the 'strictest scrutiny' reserved for facially discriminatory legislation." (102 Sup. Ct. at 3465.) An absolute embargo on export of a state's groundwater is subject to even greater scrutiny. Rarely, therefore, if ever, will any state be able to sustain the burden of justifying a statute which treats out-of-state consumption of its groundwater as different from in-state consumption.

B. The foregoing is a statement of what may be called Sporhase doctrine at broadest. If applied generally, it is a prescription for disaster.

1. Effective conservation and preservation of groundwater require not only substantive rules which are the basis for allocation of the scarce resource, but public administration and management of the resource to prevent waste and destruction.

2. For most purposes, a state's power to administer either people or natural resources stop at the state's boundaries. (But cf. Skiriotes v. Florida, 313 U.S. 69 (1941); Nevada v. Hall, 440 U.S. 410 (1979).) This makes it impossible for two states sharing a single resource to conserve or to preserve it except by agreement.

   a. Suppose that States A and B overly a small aquifer with approximately 100 wells in each state. State A's laws are more permissive toward pumpers than those of State B in the matter of one or more of the following:

      (i) efficiency required to qualify as a "beneficial use";

      (ii) limitations on pumping designed to prevent exhaustion of

water supply;

(iii) permissible degradation of groundwater quality from reduction of water table, or disposition of return flow from groundwater or surface water;

(iv) groundwater recharge programs; or

(v) restrictions of use to preserve favored use categories -- e.g., domestic use in preference to mining use.

The enumeration can be extended almost ad infinitum.

b. None of the current formal mechanisms is adequate to achieve the best administration of the interstate resource:

(1) Judicial apportionment in the original jurisdiction of the Supreme Court is inconceivable in the light of the vast number of aquifers in the nation each of which requires individualized attention.

(2) An interstate compact is too cumbersome in the light of the

usual formalities required: (1) an act of Congress consenting to negotiation; (2) an act of each state's legislature consenting to negotiation; (3) negotiation of compact by appointees of states and of United States on compact commission; (4) act of legislature of each state concerned agreeing to negotiated compact; (5) consent of Congress. Finally, when negotiated, nearly every compact in history has proved too inflexible to change, and harder to amend than the United States Constitution.

(3) For the same reasons, a "congressional apportionment" by Congress or authorized by Congress is practically impossible.

c. Happily the spirit of cooperation which produced the Mayflower Compact, the Articles of Confederation, and the United States Constitution is not dead. It produced the wholly informal apportionment by detente along the

Nebraska-Colorado border, and will probably do so wherever self interest of water users in a common resource is accurately and generally perceived. Water law in the United States, be it remembered was produced in the West out of laws, customs, and usage. Water law still depends on that creative force.

C. Sporhase, however, could easily destabilize the very mechanisms necessary to promote interstate cooperation and understanding.

1. If agreement, formal or informal, or overriding congressional legislation is impossible, each state which is a party to a dispute with one or more hostile states has only one defense: unlimited pumping to insure that each recovers its share of the resource before it is too late.

2. Pre-Sporhase, that could lead to reciprocal legislation, informal agreements, or judicial settlements of arrangements worked out between State Engineers. See Albion-Idaho Land Co. v. Naf Irrig. Co., 97 F.2d 439 (10th

Cir. 1938) for an interstate agreement which in form is a judicial decree apportioning waters of Clear Creek between Idaho and Utah.

3. Post-Sporhase, a broad reading of the decision destroys incentives to negotiate interstate agreements, or to achieve the results of an agreement by reciprocal legislation. The relationship of adjudication to compacts was recognized in the first interstate suit over water rights in history, where the Court quoted this famous passage from Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 726 (1838):

> "Bound hand and foot by the prohibitions of the Constitution, a complaining state can neither treat, agree, nor fight with its adversary, without the consent of Congress. A resort to the judicial power is the only means left for legally adjusting or persuading a state which has possession of disputed territory to enter into an agreement or compact relating to a controverted boundary. Few, if any, will be made when it is left to the pleasure of the state in possession; but when it is known that tribunal can decide on the right, it is most probable that controversies will be settled by compact." (Kansas v. Colorado, 185 U.S. 125, 144 (1902).)

4. If a state, or its water users, can ignore the laws of a neighboring state and appropriate water under the commerce clause there will be no incentive either to adopt conservative measures, or to reach interstate agreements. The race to the pumphouse will be the only defense remaining. Illustration is found in El Paso's suit against S.E. Reynolds, State Engineer of New Mexico, where El Paso successfully attacked -- invoking Sporhase -- the constitutionality of New Mexico's statute barring export of groundwater. The New Mexico statute, by making an exception for water in tank trucks, was peculiarly vulnerable since it made no attempt to differentiate water reduced to possession and a water right. However, New Mexico's right to conserve and preserve water is probably not affected by the statute. Although the water El Paso seeks to appropriate from New Mexico would be pumped from two interstate aquifers underlying New Mexico, Texas, and Mexico, the water El Paso seeks is in quantities reachable only in New

El Paso unusual extension of application of doctrine of equitable apportionment

Mexico, and inaccessible to any point in Texas. If successful, El Paso would demand a permit from New Mexico, accepting formal conditions as if El Paso were in New Mexico. But El Paso is not in New Mexico, thereby creating a list of presently insoluble questions of which the following are illustrations.

a. Can El Paso, a creature of Texas law which knows no right of appropriation of percolating groundwater, "appropriate" water under New Mexico and receive thereby a protection which Texas law would refuse?

b. After an El Paso "appropriation" of groundwater can New Mexico still change its groundwater law as it has done with almost every legislative session since adopted in 1927, or would El Paso's "appropriative" right be frozen against change, however necessitous?

c. Can the State Engineer of New Mexico enforce conservation

measures to insure beneficial use of water in an out-of-state location of use?

d. Can El Paso's hoped-for "appropriative right" be reallocated through eminent domain as can water rights for use in Texas and New Mexico?

e. Can the Legislature of either state take steps to regulate prices for water service paid by municipal users which include El Paso's hoped-for "right" in New Mexico?

f. Will New Mexico be entitled to reimbursement of its taxpayers for costs of safeguarding and administering the sources of water in New Mexico used in Texas? If so, from whom?

g. How can Texas and New Mexico effectively reach agreement, if the subject matter of the agreement has been allocated by a federal district court decision.

h. Are there limitations as a result of an "El Paso" appropriation on

the power of the people of Texas to alter, amend, or revoke El Paso's organic law, its boundaries, or its existence as a municipal corporation?

VII. Prognosis.

A. Happily, it lies within Congress' power to restore the status quo ante Sporhase. But while it remains uncertain whether Sporhase changed anything along the Nebraska-Colorado border, an effort to persuade Congress is premature.

1. The status quo ante Sporhase, with respect to methods to allocate, administer, and manage interstate groundwater was far from clear or ideal.

2. The 98th Congress, like the 97th Congress, has been dithering about legislation to facilitate interstate coal slurry pipelines. (See H.R. 1010 and S. 267, 98th Cong., 1st Sess.) While both Senate and House Committees have evidenced willingness to say almost anything to reassure those worried by Sporhase that "State water law" shall be respected, enforced, and

enthroned, it has been difficult to persuade the sponsors that "State water law" and interstate coal slurry pipelines are truly incompatible.

3. Incompatibility is illustrated by South Dakota's "sale" of Missouri River System water, described by South Dakota's Governor Janklow enthusiastically in June 1982. Under existing law, any unappropriated water diverted from the Missouri River is a resource which belongs to all upstream and all downstream states who share it. Downstream states have litigiously objected. Coal slurry legislation sponsors have proposed or accepted amendments that say something like "State water law and interstate apportionments by compact or any other means, too."

4. The fact is that "State water law" means the law of each of 50 states. There is no assured way under federal interstate common law of equitable apportionment to make a present allocation by South Dakota to a coal

slurry pipe line subject to a future compact or a future judicial apportionment. Conversely, there is no way for South Dakota to make a present allocation of water paramount to a future compact or a future apportionment. It is probably fortunate that this is true. All larger project planning has suffered from overoptimism in refusing to recognize the limited nature of the water resource. Overoptimism has been the enemy of prudent conservation.

B. The coal slurry solution, I would urge, if as proposed slurry pipelines are to be authorized in the national interest by the Secretary of the Interior, is to require the Secretary to determine that unappropriated water is available for the pipelines for which the Secretary's approval means the exercise of federal condemnation for acquisition of rights-of-way. That is a minimal federal responsibility. No state can perform it in a federal system. Hinderlider v. La Plata & Cherry Creek Ditch Co., 304 U.S. 92 (1938). Indeed, the State Engineer of

one state lacks authority to install a stream gauge outside the state which commissioned him.

C. Until the Sporehase litigation is concluded -- and we know its outcome in terms of whether Nebraska can conserve groundwater for use in Nebraska -- the course of wisdom among the states is to remember that the Nebraska statute, its reciprocity embargo excised, is now expressly a survivor of Supreme Court scrutiny. Success should attend its invocation if the state shows that the conditions imposed are and closely related to the conservation and preservation of groundwater.

Precisely, what kind of evidence will serve? Is it necessary, or is it possible, to do more than to show that a groundwater basin with a number of users is in jeopardy if those pumping from the east side are subject to regulations materially more permissive than those on the west side? In the fullness of time, the Court will surely arrive at the correct answer to that question. The danger is that the groundwater resources may be irreparably damaged before the Court identifies the problem.

See Tarlock, So Its [sic] Not Ours -- Why Can't We Keep It? A First Look at Sporehase v. Nebraska, 18 Land & Water L. Rev. 137 (1938), a somewhat more alarmed view of Sporehase than one taken here.

D. One other thing should be done. Coupled to the Nebraska Sporehase statute, now repaired by surgery, should be a standing offer in terms like these:

> "The State Engineer [the term State Engineer is better than Director of Water Resources, because the job should require a licensed civil engineer knowledgeable in hydrology] of this State shall stand ready to enter into negotiations with his counterpart in any other state or states with access to groundwater shared by this state and such other state or states to reach agreement to create an interstate groundwater management district with power
>
> (a) to limit total groundwater extractions to safe annual yield, as the agreement may in each instance define that concept,
>
> (b) to determine equitable share of water rights which the interstate supply will probably make available to each state,
>
> (c) to provide regulations enforceable in both states to preserve the aquifer and its water content in the best usable condition quality of water:
>
> (d) to provide for financing of interstate conservation district by
>
> (a) an ad valorem real estate tax on land benefited in each state,
>
> (b) extraction tax on pumped water, or
>
> (c) water rate charges applicable to water served by the

the district." U.S. Steel Corp. v. Multistate Tax Common, 434 U.S. 452 (1978) opens the way to more informal compacts, holding that some compacts at least are effective without Congress consent, subject however to Congress' disapproval.

1. That is a bold and innovative step. It should be limited, in the first instance, to an effective period of say 5 years before renegotiation. Renegotiation should be permitted for progressively longer periods, but avoiding carefully and zealously the rigidity of most interstate compacts which Professor John A. Carver, Jr., described from this platform in 1982.

2. Is the proposal too innovative? I think not. In fact, it is needed to deal with groundwater even if Sporehase, El Paso, and new water demands for slurrying coal had never been heard of.

3. What would be the benefits? Successful interstate groundwater conservation districts, freed temporarily from the necessity of seeking permanent legislation at a state capital, might well become models for groundwater management. I have not included any

description of the political management of such a district, but a cafeteria of models is possible. A few illustrations should be incorporated in the statute. A municipal corporation, rather than a private corporation, is the model I have in mind. Use of water was a recognized public use, even when the Court almost invariably spoke in tones of deepest economic conservatism. Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112 (1896) (opinion upholding California Wright Irrigation District Act of 1887 by Rufus Peckham, author of Court's opinion in Lochner v. New York, 198 U.S. 45 (1905)). Only Fuller, C.J., and Field dissented in Fallbrook without opinion).

Finally, such entities should be permitted to join as parties with their states. They will have the experience to persuade the courts and the legislatures what works, and why.

For an excellent survey of Interstate Cooperation and recent literature, see Mary Ellen Harris, Interstate Cooperation in Water

Resources Management, (Institute of Urban and Regional Research, University of Iowa, Iowa City, Iowa 52242 1983).

D. The limits of constitutional doctrine.

The development of the laws of water and water rights in the United States offers a compelling demonstration that concepts like "ownership," "title," "public rights" and "private rights" are necessarily subordinate to limitations built into the law of the physical universe -- like that which causes water to flow to a lower level. There is one such limitation which is built into the structure of federalism in the United States. I repeat it here because it will ultimately compel the parts of the governmental structure each to limit its function to what it can achieve.

> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Not one of the cases discussed involves the limits of that power of Congress, although there are limits. The issues of water rights in Sporehase and in El Paso

relate solely to what states are forbidden to do because of the existence of that clause. All such issues are for the Supreme Court to decide in the first instance. The danger, however, is that the Court in deciding what that clause forbids -- purely by negative inference -- will forget or overlook three facts:

1. A Supreme Court decision disabling or appearing to disable or suspend state law does not of itself create a federal substitute for the law destroyed.
2. Without the affirmative legislative power of Congress, the Supreme Court does not have power to appropriate money, to tax, or to administer laws.
3. Water resources require not only administration and management to meet ongoing experience, but a responsiveness to unforeseen and unforseeable local conditions. The national legislature cannot adequately respond to the exigent water needs in 50 separate states, many of which vary within a state as a sharply as needs in one state differ from those of another.

The power of the Supreme Court, however, is even more limited, because the Court lacks both the power of purse and sword. The Court's power under the commerce clause where Congress has not legislated is a power limited to saying no.

Administration and management of fragile water resources demands a lawmaking power which can also say yes -- without delay. Water law must adapt to perceived local necessity. Federal power is important, because the resources are federal in dimension. But the forces that shape the law interstate water rights must come from the initiatives of those within the states and must be built upon custom and experience. It is now a legislative function -- state and federal -- to nurture the mechanisms to create flexible interstate law to administer the most fragile of interstate natural resources.